United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1135

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

ENID SALTER a/k/a AARON SALTER,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK
CR. 1973-302.

BRIEF FOR APPELLEE

RICHARD J. ARCARA,
United States Attorney,
Western District of New York,
Attorney for Appellee,
502 United States Courthouse,
Buffalo, New York 14202.

THEODORE J. BURNS,
Assistant United States Attorney,
of Counsel.

BATAVIA TIMES, APPELLATE COURT PRINTERS
A. GERALD KLEPS, REPRESENTATIVE
BATAVIA, N. Y. 14020
716-343-0457

INDEX.

TABLE OF CASES.

IN THE

United States Court of Appeals

for the Second Circuit

No. 75-1135

UNITED STATES OF AMERICA,

Plaintiff,

v.

ENID SALTER,

Defendant.

Preliminary Statement.

In a four-count indictment returned on September 5, 1973, Enid Salter a/k/a Aaron Salter was charged with knowingly and willfully encouraging two aliens to enter the United States without authority and bringing these aliens into the country on July 29, 1973 (App. 4a).[1] He pleaded not guilty and filed motions for discovery, bill of particulars, and suppression of evidence.

---

[1] Title 8, United States Code, Section 1324 reads in pertinent part as follows:

> (a) Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who—
>
> (1) brings into or lands in the United States, by any means of transportation or otherwise, or attempts, by himself or through another, to bring into or land in the United States, by any means of transportation or otherwise; ... or

(Footnote continued on following page)

A suppression hearing was held before the late Judge John O. Henderson on January 15, 1974, to determine the admissibility of a Border Patrol agent's testimony regarding a large quantity of currency he observed in Salter's wallet immediately prior to his arrest. After Judge Henderson's death on February 19, 1974, the case was transferred to Judge John T. Curtin who, on August 8, 1974, ruled that the money itself would be suppressed. However, the Court deferred its ruling on the admissibility of the conversation between the agent and Salter until the time of trial (Government Appendix 5).

At the conclusion of a three day trial before Judge Curtin, on January 31, 1975, a jury found Salter guilty of unlawfully encouraging the aliens' entry into the United States, as charged in Counts III and IV of the indictment, but was unable to agree on Counts I and II which charged Salter with the actual transportation of the aliens into the United States. Salter was sentenced on March 31, 1975 to 90 days imprisonment and a $1,000 fine (App. 6a). He was continued on bail pending appeal.

Statement of Facts.

The Government's proof consisted primarily of the testimony of Myrtle Hurst and Shirley Paul, the two Jamaican

---

(Footnote continued from preceding page)

> (4) willfully or knowingly encourages or induces, or attempts to encourage or induce, either directly or indirectly, the entry into the United States of—
>
> any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this chapter or any other law relating to immigration or expulsion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $2,000.00 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs ...

aliens who entered the United States on July 29, 1973, and Leo Fernan, a Border Patrol agent who conversed briefly with Salter prior to his arrest.[2]

Paul, a citizen of Jamaica, testified that after visiting and residing for approximately one month in Toronto, Canada, on July 27, 1973 she gave $600 to a man for assistance in bringing her into the United States (App. 136a-137a). Two days later, this unidentified man came to her Toronto apartment together with the defendant who introduced himself to Paul, told her that he had received her $600 and would take her and another woman to New York that day (App. 133a). Salter, Paul and the other man then drove to another residence in Toronto where they picked up a second Jamaican woman, Myrtle Hurst. Hurst testified that she met Salter in Toronto earlier that day and agreed to pay him $250 to take her to the United States (App. 14a). Hurst got into the automobile and gave Salter the $250 in Canadian currency (App. 17a). Salter, the two Jamaicans, and the unidentified man then drove to another house in Toronto where the unidentified man departed, Salter and the Jamaican women got into another automobile, and were joined by three other persons who Salter introduced as his wife and two children (App. 82a).

With his wife and children and the two Jamaican women as passengers, Salter then drove from Toronto to Fort Erie, Ontario, where the Peace Bridge joins Canada with the United States (App. 117a). During the trip Salter told Paul that, if asked at the U. S. Border, she should say she was born in Buffalo and was going to New York (Government App. 7). He gave Paul his wife's identification cards to produce if required by the border authorities (Government App. 9). Salter then left Hurst with his wife at a restaurant in Fort Erie, and

[2] An immigration officer also testified regarding the requirements for lawful entry of aliens into the United States.

drove across the Peace Bridge into the United States with Paul and his two children (Government App. 10). He took these passengers to his home in Buffalo where he exchanged cars, returned to Fort Erie, picked up his wife and Hurst and drove them both across the Peace Bridge to his home where they joined Paul (Government App. 12-13).

A few hours later, Salter took Hurst and Paul to the bus terminal in Buffalo where the women purchased one way tickets for their travel to New York City that evening (Government App. 14). However, as they were about to board the New York City bus, Hurst and Paul were approached by two Border Patrol agents who asked them and Salter their citizenship. After the women admitted they were aliens who had entered the country unlawfully with the defendant's assistance, Salter was placed under arrest by the agents. Prior to his arrest, however, when he was producing his identification papers, Salter inadvertently exposed a large quantity of Canadian and American currency in his wallet (Government App. 29-32).

Salter testified in his own defense and admitted being in Canada earlier that day with his family to join a friend named Mike for a picnic. However, when Salter and his family arrived in Toronto, he discovered that Mike's wife had left her apartment somewhat earlier after a family dispute. Mike and Salter then drove to a number of places in Toronto looking for Mike's wife. During the course of their travels, Salter said that Mike picked up Shirley Paul and Myrtle Hurst who said they would be coming over to Buffalo later that day. Salter then engaged Paul in what he called a "man to woman" conversation, gave her his telephone number and suggested that she call him later that day in Buffalo (App. 143a-148a). Salter said that Mike eventually dropped off the two women at some residence in Toronto, and he and Mike returned to Mrs. Salter and the children at Mike's apartment. The Salters then drove, alone, from Toronto to Buffalo. Later that day,

Salter testified he received a telephone call from Shirley Paul who said that she and Myrtle Hurst had just arrived in Buffalo and would like him to pick them up at the Peace Bridge. Salter went to the bridge, met the two Jamaicans and drove them back to his house where he introduced them to his wife as relatives (App. 143a). While the women were at his house, Salter telephoned the bus terminal to find out when the next bus was leaving for New York City. A short time later, he drove Hurst and Paul to the bus terminal where they were approached by the Border Patrol agents and Salter was eventually arrested.

Carol Salter, wife of the defendant, testified and generally supported her husband's version of the day's events. Salter's younger brother, Stanley, also testified and corroborated Salter's testimony that Stanley had given him approximately $1,000 to hold for safekeeping.

Questions Presented.

1. Was Agent Fernan's testimony regarding his observation of Canadian money in Salter's wallet admissible?

2. Was the evidence legally sufficient to support the convictions?

3. Was Shirley Paul's testimony regarding the $600.00 she paid for assistance in entering the United States admissible?

ARGUMENT.

POINT I

The testimony regarding Agent Fernan's observation of Canadian money in Salter's wallet was admissible since it was within the "plain view" of the witness.

The facts surrounding Agent Fernan's observation of Canadian and American currency in Salter's wallet are not disputed. Fernan testified at the suppression hearing that on July 29, 1973 he was working with Agent Chandler at the Greyhound Bus Terminal in Buffalo, New York, checking bus passengers for possible violations of the Immigration laws (Government App. 43-44).[3] When he noticed Salter and the two women standing on the loading platform and apparently about to board a New York bound bus, the agents approached them, identified themselves as Border Patrol agents, and asked all three to state their citizenship (Government App. 46). While Salter said he was born in Buffalo, the two women said they were born in "Boofalo" and spoke in a "high English accent" which Fernan believed to be Jamaican (Government App. 37, 46). Their suspicions aroused, the agents separated the women from Salter in order to continue their inquiry. Agent Chandler escorted the women inside to the terminal waiting room. Agent Fernan and Salter went to a baggage room in the terminal where Fernan asked Salter to produce some identification (Government App. 47). Salter took his wallet out of his pocket, removed his driver's license from the wallet and showed the license to Fernan. While Salter was getting his license out of the wallet, Fernan observed a large quantity of Canadian and American currency in the wallet

[3] Fernan estimated that over one million aliens unlawfully entered the United States from Canada during the last ten to fifteen years (Government App. 74).

(Government App. 47). Fernan then asked Salter to remove the money and count it. Salter did so, and both he and Fernan counted out $900, including approximately $500 in Canadian bills. The money was then returned to Salter who put it back in his wallet. Shortly thereafter, Agent Chandler returned from his questioning of the two Jamaicans and, on the basis of statements made by them, he placed Salter under arrest. The defendant was advised of his rights and declined to make any statements to the agents (Government App. 48-51).

Judge Curtin determined that "the border patrol agent had the right to ask defendant Salter for *identification* to ascertain Salter's nationality. However, at the time of the request for identification, the Agent had no reason to count the money in Salter's wallet" (Government App. 3-4 emphasis in the original). Accordingly, the Court ruled that "the money itself is suppressed. However, the Court will defer ruling upon the conversation between agent and defendant until the time of trial" (Government App. 5).[4] At trial the Court would not allow Fernan to testify about the counting of the money but did permit the agent to testify about his observation of the bills (Government App. 22-28).

A. The Government Agent had sufficient grounds to question Salter at the bus terminal.

The Supreme Court has recognized that

> a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest. *Terry v. Ohio*, 392 U. S. 1, 22 (1968).

---

[4] The money was not retained by the agents, nor was it used in evidence at trial. The Government did, however, offer testimony of the agent as to what he observed in Salter's wallet when he produced his identification.

In a later articulation of the rationale underlying this authority, the Court reasoned that

> [t]he Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response (citation omitted). A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.

Adams v. Williams, 407 U. S. 143, 145-146 (1972).

Since the Supreme Court's decision in the *Terry* case, several Circuit Courts have recognized that so-called "investigatory stops" are permissible under a variety of circumstances. For example, a police officer may make an investigatory stop and detention on something less than probable cause when he knows a robbery had just been committed in the vicinity and he sees an individual fleeing from the scene, *United States v. Hines*, 455 F.2d 1317 (C.A.D.C., 1972); or when an officer receives an unverified police report that a van was observed carrying several passengers hiding under blankets who may be illegal aliens, *United States v. Hernandez*, 486 F.2d 614 (7th Cir. 1973); or when a policeman spots a car which had earlier been seen suspiciously circling a petroleum gasoline tank several times at 4:30 in the morning, *United States v. Harflinger*, 436 F.2d 928 (8th Cir. 1970); or when a passenger who chartered a private plane first claims that a large footlocker smelling of moth balls is his, but later denies ownership of the locker when asked to open it, *United States v. Scheiblauer*, 472 F.2d 297 (9th Cir. 1973); or when an automobile slowly passes by a service station which had just been robbed and the car's passengers are intently staring at the station, *Dell v. Louisiana*, 468 F.2d 324 (5th Cir. 1972).

This Court has also recognized *Terry's* "rather lenient test" and upheld the stopping of a person reputed to be a major narcotics dealer who was observed going in and out of a building with a paper bag "which has long been a sort of hallmark of the narcotics business." *United States v. Santana*, 485 F.2d 365, 368 (2nd Cir. 1973).

Because of the substantial number of aliens unlawfully entering the country across the Mexican border, the Ninth Circuit has had several opportunities to apply the *Terry* holding to automobile stops by Immigration authorities where they suspected the occupants may be illegal aliens. Such stops have been upheld when based on a "founded suspicion", which may be less than probable cause, *United States v. Bugarin-Casas*, 484 F.2d 1181 (9th Cir. 1974), *Cf. United States v. Mallides*, 473 F.2d 859 (9th Cir. 1973), but requires the officer to "be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the stop. *Terry v. Ohio, supra*, 392 U.S. at 20 (1968).

Very recently, the Supreme Court generally affirmed the Ninth Circuit's view of the Border Patrol agent's authority to stop a vehicle which the agent believes may contain aliens not lawfully entitled to be in the country. *United States v. Brignoni-Ponce*, 43 U.S.L.W. 5028 (decided June 30, 1975). After taking note of the valid public interest in controlling the illegal entry of aliens into the United States, "the minimal intrusion of a brief stop, and the absence of practical alternatives for policing the border," the Court ruled that

> when an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke suspicion . . . The officer may question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances . . .

U.S. v. Brignoni-Ponce, supra, 43 U.S.L.W. at 5031.

Applying the *Brignoni-Ponce* test to this case, the facts were clearly sufficient to warrant the investigatory stop and very brief detention.[5] The experienced Border Patrol agents were working in a transportation terminal in one of the major points of entry from Canada into the United States, no more than two miles from the border.[6] By reason of his training and experience, Agent Fernan was able to discern an individual's national origin by the person's accent and manner of speech. He understandably suspected something was awry when the women claimed United States citizenship in Jamaican accents and were about to leave Buffalo for New York City. He had further cause to pursue his inquiry when he found that Salter, the women's companion, had no similar accent and was not traveling with them to New York. Under these circumstances, Fernan had ample justification for continuing his limited investigation.[7]

---

[5] The "intrusion" on Salter's liberty was more "minimal" than the stopping of the automobile in *Brignoni-Ponce*. Salter was already "stopped" and waiting patiently for a bus to leave at the time he was approached by the agents.

[6] There are three bridges connecting the two countries within 25 miles of the bus station: Peace Bridge in Buffalo, Rainbow Bridge in Niagara Falls, and Lewiston-Queenston Bridge in Lewiston, New York.

[7] This Court's recent decision in *United States v. Barbera,* 514 F.2d 294 (2d Cir., 1975) is inapposite. In *Barbera,* the agent had no cause for suspicion when he initially stopped and questioned the defendant. Indeed, the Government sought to justify the agent's actions in that case on the theory that they constituted a "border search" at a functional equivalent of the border within the meaning of *Almeida-Sanchez v. United States,* 413 U.S. 266 (1973). No such claim is asserted by the Government in this case. *Cf. United States v. Lincoln,* 494 F.2d 833 (9th Cir., 1974).

B. The money in Salter's wallet was in "plain view".

If the initial questioning of Salter was justified,[8] Agent Fernan's observations are clearly admissible since "it has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence." *Harris v. United States*, 390 U.S. 234, 236 (1968). See *Coolidge v. New Hampshire*, 403 U.S. 443, 464-473 (1971).

Fernan conducted no general or exploratory search. He merely asked Salter to produce some identification, a simple requirement which this Court has found justified on the basis of *Terry* and *Adams*. *United States v. Santana*, 485 F.2d 365 (2nd Cir. 1973). Moreover, as the Ninth Circuit has said, "there can be no question but that federal agents upon validly stopping a vehicle may ask for some identification of the driver. Such is necessarily a part of any law enforcement agency's procedure". *United States v. Lincoln*, 494 F.2d 833, 838 (9th Cir. 1974).

Fernan did not order Salter to produce his wallet or its contents. As a matter of good police practice, he routinely asked Salter for identification. When Salter was getting the license out of his wallet, the only way that Fernan could avoid seeing $900 in small denomination of American and Canadian currency would be for him to close his eyes or turn away from the individual he was questioning, an obviously unsatisfactory and potentially dangerous practice. Since the incriminating evidence inadvertently came into the agent's plain view pursuant to an initial lawful intrusion, the agent could properly testify about what he saw. See *United States ex*

[8] Indeed, at page 7 of his brief appellant concedes the "right of the Border Patrol Agent to ask for identification of the defendant".

rel. LaBelle v. LaVallee, ... F.2d ....., Slip Opinion, P. 3837 (2nd Cir., decided May 30, 1975).[9]

POINT II.

The evidence was legally sufficient to support the convictions.

Salter's counsel effectively pointed out to the jury, at some length, the prior false statements made by Hurst and Paul when they denied knowing the identity of the other woman who travelled with them from Toronto to Buffalo. As the jury learned, Hurst and Paul lied about this fact at a preliminary hearing and before the Grand Jury. However, at the time of trial both witnesses indicated that their earlier prevarications were caused by sympathy for Mrs. Salter and a desire to keep her out of trouble, once her husband had been arrested and charged with bringing them into the United States.

At the conclusion of the trial, Judge Curtin properly instructed the jury that "If you find that the witness has lied with respect to any material portion of his or her testimony, you may disregard that portion which you find to be unbelievable, or you may, if you desire, disregard the entire testimony of that witness" (App. 177a). He emphasized to the jury that "it is up to you ladies and gentlemen, from all of the evidence in the case, to make up your mind about where the truth lies" (App. 175a). The Court also instructed the jury on the elements of the offenses, presumption of innocence, burden of proof, reasonable doubt, and possible interest or bias

[9] While Fernan did ask Salter to remove and count the money, Judge Curtin refused to allow the agent to testify about the actual counting and amount of money. Therefore, the only issue in dispute is Fernan's testimony that he observed "a sizable amount" of American and Canadian currency in a "thick" wallet.

of the witnesses. Salter's counsel made no request or exceptions to the charge (App. 187a).

When viewed in the light most favorable to the Government, *Glasser v. United States*, 315 U.S. 60, 80 (1942), *United States v. McCarthy*, 473 F.2d 300, 302 (2d Cir., 1972), and taking into account the evidence presented by the defense as well as by the Government, *United States v. Tramunti*, 500 F.2d 1334, 1338 (2d Cir., 1974), there was ample justification for the jury's finding that Salter had unlawfully encouraged the entry of the aliens into the United States. Indeed, the jury's failure to arrive at a verdict on the counts charging Salter with the actual transportation of the aliens into the United States indicates that the members of the jury may have resolved the question of the aliens' credibility on the one hand, and Salter's credibility on the other, by finding that Salter knowingly and willfully encouraged the Jamaicans to enter the United States later that day, but stopped short of actually transporting them across the bridge.

In any event, the testimony of the two aliens, together with Salter's presence at the bus terminal and his admissions on the witness stand, provide a sufficient basis for the fact-finder to conclude beyond a reasonable doubt that Salter was guilty of the offenses charged.

POINT III.

Shirley Paul's testimony regarding the $600.00 she paid for assistance in entering the United States was admissible.

Shirley Paul testified that "On the 27th of July, 1973, I gave this man $600.00 to give to Mr. Salter to take me to—" (App. 136a-137a). She also testified that when she met Salter on July 29, 1973 and entered the automobile in which he was a

passenger, "Mr. Salter told me he got my $600.00 and it is okay, he will take me to New York and we are going for the other woman in Toronto now" (App. 133a).

The relevance of this testimony is obvious: it shows the knowledge, intent and willfullness required by Section 1324(a)(1) and (4). One does not innocently demand the exorbitant fare of $600.00 for the relatively inexpensive 80-mile trip from Toronto to Buffalo. In any event, while Mrs. Paul was allowed to testify that she gave $600.00 to an unidentified man two days prior to meeting Salter, the Court refused to permit Mrs. Paul to testify about any conversations she had with this unidentified man.

Conclusion.

It is respectfully submitted that for the foregoing reasons the judgment of conviction should be affirmed.

Respectfully submitted,

RICHARD J. ARCARA,
United States Attorney,
Western District of New York,
Attorney for Appellee,
502 United States Courthouse,
Buffalo, New York 14202.

Theodore J. Burns,
Assistant United States Attorney,
of Counsel.

AFFIDAVIT OF SERVICE BY MAIL

State of New York)
County of Genesee) ss.:
City of Batavia)

RE: U. S. A.
v
Enid Salter et al
Docket No. 75-1135

I, Leslie R. Johnson being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

On the 10 day of July, 19 75 I mailed 2 copies of a printed Appendix and Brief in the above case, in a sealed, postpaid wrapper, to:

John Napier, Esq.
617 Liberty Bank Building
Buffalo, New York 14202

at the First Class Post Office in Batavia, New York. The package was mailed Special Delivery at about 4:00 P.M. on said date at the request of:

Richard J. Arcara, U. S. Attorney
502 U. S. Courthouse, Buffalo, New York 14202

Leslie R. Johnson

Sworn to before me this

10 day of July, 19 75

Monica Shaw

MONICA SHAW
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 19 77